80-1149

Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

GEORGE MARTIN, ET AL,

Petitioners

VS.

CHARLOTTE-MECKLENBURG BOARD OF EDUCATION

and

CARRIE L. GRAVES, ET AL

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

1. When, in order to remedy racially segregative attendance assignments in a public school system, a United States District Court has directed the authorities of that school system to put into effect racially integrative attendance assignments as specifically prescribed by the Court, and the school authorities having thereafter done so, and admixtures of races having been fully achieved in each and all of the schools in the exact ratios of race designated by the Court orders — but variances from such racial attendance ratios having subsequently developed in some of the schools, though not by reason of any reoccurrence of official segregative actions — are not the pupils in these schools entitled to constitutional protection against being again reassigned, on account of their race, and compulsorily moved here and there among the schools of this system for the purpose of continually re-creating racial ratios as desired by the District Court or by the school authorities?

2. Do not the decisions of this Court, in *Brown vs. Board of Education* and *Swann vs. Charlotte-Mecklenburg Board of Education* and *Pasadena City Board of Education vs. Spangler,* assure to the school pupils, in this situation, constitutional protection against being repeatedly subjected, because of their race, to such compulsion at the hands of governmental authorities?

LISTING OF ALL THE PARTIES IN THE CASE

The plaintiffs in the case, now Petitioners to this Court, are as follows: — GEORGE MARTIN, for himself

and in behalf of his minor children, ELLEN and CATHERINE MARTIN; MR. and MRS. J. D. WALL, for themselves and in behalf of their minor children, CHRIS and STEVE WALL; JOHN and SUSAN ALDEN, for themselves and in behalf of their minor children, SUZANNE and SCOTT ALDEN; MR. and MRS. RICHARD K. DUNHAM, for themselves and in behalf of their minor children, SCOTT and KRISTIN DUNHAM; MRS. NANCY KATE GORDON, for herself and in behalf of her minor children, ADAM, KERRY, DAWN AND SEHM GORDON; John and PRISCILLA HURLEY, for themselves and in behalf of their minor children, NICOLE and TIFFANY HURLEY; MR. and MRS. JAMES H. JONES, for themselves and in behalf of their minor child, ROBYN JONES; ANDREW C. JOHNSON, for himself and in behalf of his minor children, TRACEY and RANDY JOHNSON; DARRELL and SANDY MYERS, for themselves and in behalf of their minor children, TIFFANY and ZACHARY MYERS; HENRY and JOHANNA L. ASHBAUGH, for themselves and in behalf of their minor children, HENRY and CHANNING ASHBAUGH, MR. and MRS. M. B. CAMPBELL, JR., for themselves and in behalf of their minor children, BINFORD and BRADLEY CAMPBELL; LARRY L. and PHYLLIS C. FALCONE, for themselves and in behalf of their minor children, MICHELLE and MATTHEW FALCONE; MRS. MARLENE BEAVER, for herself and in behalf of her minor child, SUZIE BEAVER; DR. and MRS. EDWARD BONOMO, for themselves and in behalf of their minor child, TRICIA BONOMO; TONY and JUDITH AREY, for themselves and in behalf of their minor children, ASHLEY and BRENT AREY; MRS. PATRICIA M. BOWER, for herself and in behalf of her minor children, SCOTT and

MARK BOWER; THOMAS and EDWINA GIBSON, for themselves and in behalf of their minor children, TRACYE, BRANDY and ASHLEY GIBSON; MR. and MRS. PATRICK DOHERTY, for themselves and in behalf of their minor child, JEFFREY DOHERTY; DON and BETTY ANDERSON, for themselves and in behalf of their minor children, BRIAN and BETH ANDERSON; MRS. BARBARA GROCE, for herself and in behalf of her minor children, HAL, MARTHA and CLARK GROCE; MR. and MRS. JAMES E. TOWNSEND, for themselves and in behalf of their minor child, DONNA TOWNSEND; MR. and MRS. CHARLES GUIDUCCI, for themselves and in behalf of their minor children, KIM and LORI GUIDUCCI; MRS. MARTHA MCWATTERS, for herself and in behalf of her minor children, DARREN and JENNIFER MCWATTERS; TOM and CAROLYN IRVIN, for themselves and in behalf of their minor child, ERIC IRVIN; MR. and MRS. SIMON IYOOB, for themselves and in behalf of their minor children, JOHN and FRANK IYOOB; MR. and MRS. WAYNE KELLY, for themselves and in behalf of their minor child, JEFF KELLY; NEIL and REBECCA MCDUFFIE, for themselves and in behalf of their minor children, KIMBERLY, SHARON and PATTI MCDUFFIE; MRS. CHRISTIE T. CARMER, for herself and in behalf of her minor child, ROBERT ANTHONY CARMER; CARL and JACKIE BINNEY, for themselves and in behalf of their minor children, JASON and MARTY BINNEY; MR. and MRS. ARTHUR TARLETON, for themselves and in behalf of their minor child, ART TARLETON; MR. and MRS. MARC EPSTEIN, for themselves and in behalf of their minor children, KELLY and BRADLEY EPSTEIN; SPENCER and MARILYN GAYLORD, for themselves and in behalf of their minor children, LISA

and DAVID GAYLORD; MR. and MRS. JAMES H. CROPPER, for themselves and in behalf of their minor child, CHERYL CROPPER; WILLIAM and KATHLEEN SHAKE, for themselves and in behalf of their minor children, JULIE and JEFF SHAKE; MR. and MRS. JOE MCCROREY, for themselves and in behalf of their minor children, MARK and JASON MCCROREY; MR. and MRS. T. G. ROCHE, for themselves and in behalf of their minor children, ANNA and GEDDINGS ROCHE; JAMES and ELIZABETH MOORHEAD, for themselves and in behalf of their minor children, DEBBIE and WENDY MOORHEAD; MRS. W. F. MCGINTY, for herself and in behalf of her minor children, MARK and GRETCHEN MCGINTY; ROBERT and KATHRYN SCHLAU, for themselves and in behalf of their minor child, BRIAN SCHLAU; MRS. MARY K. PADEN, for herself and in behalf of her minor child, JAMES PADEN; MR. and MRS. JOHN SHRIVER, JR., for themselves and in behalf of their minor children, SUE and CHRIS SHRIVER; MR. and MRS. RICHARD SHANKLIN, for themselves and in behalf of their minor children, MATHEW and KELLY SHANKLIN; MR. and MRS. GEORGE WIGHTMAN, for themselves and in behalf of their minor children, SHANNON and MICHELLE WIGHTMAN; and MR. and MRS. J. ANDREW WILLIAMS, for themselves and in behalf of their minor children, TODD, PAMELA and ALLISON WILLIAMS.

The defendant in the case is the CHARLOTTE-MECKLENBURG BOARD OF EDUCATION.

Intervenor defendants in the case are as follows: — CARRIE L. GRAVES, on her own behalf and on behalf of

her minor children, CARLA PLATT, GORDON PLATT and LAMONT PLATT; GAYNELL HARRIS GRIER, on her own behalf and on behalf of her minor child, SEBRINA GRIER; ROBERTA S. THOMPSON, on her own behalf and on behalf of her minor children, JAMES L. THOMPSON and LADONNA R. THOMPSON; SARAH R. MASON, on her own behalf and on behalf of her minor children, JACQUELINE DENISE MASON and JADE DAVENE MASON; ELMA ELLISON, on her own behalf and on behalf of her minor children, TARA ELLISON and BRETINSA ELLISON; MABEL JONES, on her own behalf and on behalf of her minor children, JACQUELINE JONES, LESLIE SHARON JONES, ERIC JONES, IRVIN JONES, RAYFORD JONES, JR., and FELECIA JONES.

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OPINIONS OF THE COURTS BELOW

The opinion of the United States Court of Appeals is published at 626 F. 2d 1165 (4th Cir., 1980), and is also printed in the Appendix to this Petition.

The opinion of the District Court is published at 475 F. Supp. 1318 (W.D.N.C., 1979). The District Court's opinion is lengthy and is therefore set forth in a separate Appendix filed herewith.

JURISDICTION OF THIS COURT

The opinion of the Court of Appeals, embodying its decision and judgment, is dated July 23, 1980, and was entered on that date.

Thereafter, the Petitioners applied to the Court of Appeals for permission to file a Petition for Rehearing. The Court of Appeals granted such request for permission to file Petition for Rehearing, but ruled on the merits against rehearing, on October 14, 1980. The filing of this Petition for Certiorari is within ninety days from the date of such denial of rehearing. *Bowman vs. Loperena*, 311 U.S. 262, 266.

Jurisdiction to review the decision of the Court of Appeals, by writ of certiorari, is conferred on this Court by the provisions of 28 U.S.C. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

"No person . . . shall be . . . deprived of life, liberty or property, without due process of law".

Fifth Amendment to the
Constitution of the United States

"No State shall . . . deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws".

Fourteenth Amendment to the
Constitution of the United States

"No person shall be refused admission into or be excluded from any public school in this State on account of race, creed, color or national origin. . . . No student shall be assigned or compelled to attend any school on account of race, creed, color or national origin".

General Statutes of North
Carolina, Section 115-176.1

STATEMENT OF THE CASE

This suit was brought by the plaintiffs, who are now Petitioners before this Court, for themselves and in behalf of their minor children, pupils in the schools of the Charlotte-Mecklenburg public school system. The action was instituted in the United States District Court for the Western District of North Carolina, that Court having jurisdiction by reason of the plaintiffs' allegations that they were being deprived of rights assured to them by the Constitution of the United States and by the decisions of this Court.

The plaintiffs asked for injunctive relief, which the District Court, after a hearing, denied. Upon appeal by the plaintiffs, the Court of Appeals affirmed the ruling of the District Court.

In *Swann vs. Charlotte-Mecklenburg Board of Education*[1], this Court upheld findings and conclusions by the same District Court that there had been racially segregative attendance assignments in the Charlotte-Mecklenburg public school system, and that by way of remedy and correction it was proper and appropriate for the District Court to direct that racially integregative assignments be put into effect in these schools.

Although this Court stated in *Swann* that it expressly rejected any concept that the District Court should or could require "any particular degree of racial balance or mixing"[2], the orders of the District Court, both prior and subsequent to this Court's decision, did direct the Charlotte-Mecklenburg school authorities to assign the school pupils in such manner that there would be a "particular degree of racial balance or mixing" of black and white pupils in each of the schools of the Charlotte-Mecklenburg system[3], namely, that there must be blacks assigned to each school, but that blacks must constitute not more than 50 percent of the student body in any school[4].

[1]402 U.S. 1, 91 S. Ct. 1267, 28 L. Ed. 2d 554 (1971).

[2]*Swann*, 402 U.S. 1, 24, 28 L. Ed. 2d 554, 571.

[3]Except as to one school, known as "Hidden Valley" which the District Court has all along permitted to be operated with a black enrollment "exceeding 50 percent" of the student body.

[4]The District Court's Orders of February 5, 1970, June 29, 1971, and July 30, 1974, in *Swann* and plaintiffs' Exhibit 1, 428, 454-456, in the present case.

Unless otherwise indicated, all page references in this Petition are to the Joint Appendix filed with the Court of Appeals and transmitted, along with the District Court file, to the Office of the Clerk of this Court.

Both before and after the decision of this Court in *Swann*, the Charlotte-Mecklenburg school authorities instituted various programs of racially integrative pupil assignments in the Charlotte-Mecklenburg schools. The District Court, however, successively found the operation of these programs to be inadequate to the accomplishment of the Court's racial specifications.

In response to the repeated directives of the District Court, the School Board, in 1974, laid before the Court a detailed plan setting forth an exact blueprint as to how many black pupils and how many white pupils would be moved from which schools and to which schools[1], and stating what would be the resulting percentages or ratios of blacks and whites in each of the schools in the system — and projecting that upon the implementation of this program, blacks would be in attendance at each school, but would not exceed 50 per cent of the student body in any school[2]. The Court thereupon ordered that this plan be put into force and effect.

In April of 1975, the School Board filed in the District Court a "Report To The Court" with respect to implementation of this plan and program[3]. The Report stated that "the guidelines and policies as outlined in the plan have been carried out" — that the Board and its staff "working together have shown good faith and

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[1]There are some 105 schools in the Charlotte-Mecklenburg school system.

[2]Plaintiffs' Exhibit 1, 428, 454-456.

[3]Plaintiff's Exhibit 2, 458.

have without exception followed the guidelines" of the plan as ordered by the Court—and that blacks and whites were attending every Charlotte-Mecklenburg school, with blacks constituting not more than 50 per cent of the student body in any school[1].

The School Board thereupon asked for, and the plaintiffs in the *Swann* case agreed to, a "dismissal" of the *Swann* case, and the District Court, on July 11, 1975, directed that "the file" in the *Swann* case "be closed".

Approximately four years after the 1974 program had been put into effect, the School Board reported to the District Court that variances from the District Court's prescribed proportions of black and white pupils had gradually developed, and that the Court's directive that blacks should not constitute more than 50 per cent of the student body in any school was being exceeded in eight schools. With this report, the Board presented a new pupil assignment plan for the school year 1978-79, entitled "Minimal Approach To Reduce Ratios Below 50%"[2]. This plan directed that 4,825 pupils must change schools, thereby altering racial proportions in seventy-six schools[3].

The plan incidentally explained the closing of a "relatively new" school, pointing out that its "trend" was expected to "continue to be one of increasing

[1]Plaintiffs' Exhibit 2, 461, 462, 464, 480-488—again with the exception previously authorized by the Court as to the "Hidden Valley" school.

[2]Plaintiffs' Exhibit 3, 489, et seq.

[3]Plaintiffs' Exhibit 3, 490-508.

ratio[1] and decreasing enrollment", and that therefore it was being shut down[2].

Further, the report to the Court stated that:

"The total black student ratio continues to increase by about one per cent each year and is presently approximately 37%".

. . .

"... [W]e are concerned about many of the changes and more deeply concerned about the direction in which we seem to be headed".

. . .

"With a rising black ratio in the total student population, it becomes increasingly difficult to keep all individual schools below a fixed 50 per cent ceiling".

. . .

"*...[T]o relieve high ratio problems, it becomes necessary to set up long-distance busing or break up large numbers of existing relationships*" (Emphasis in original).

. . .

"The longer we want a ratio adjustment to keep a school under 50 per cent, the lower we must set the initial ratio".

. . .

"A lower initial ratio means more children on the move, and the greater the number of children on the move, the greater the likelihood of long distance busing".

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[1]In all the pupil assignment documents and records, the term "ratio" is uniformly used as meaning the percentage of blacks in a school.

[2]Joint Appendix, 310, Plaintiffs' Exhibit 3, 507.

"The [following is the] most efficient type of adjustment for the type of problem situation here under consideration ('efficient' is used here in the sense of getting the necessary ratio modification with a minimum number of students to be changed)":

"a. If the problem is a combination of high ratio and over-capacity, reassign black students".

"b. If the problem is high ratio and under-utilization, add white students".

"c. If the problem is high ratio and the projected membership is such that the desired ratio reduction cannot be achieved by removing black students (without causing under-utilization), use a combined movement of whites in and blacks out . . ."[1].

Despite the urgent protests of many parents and pupils[2], and the filing of the present suit, this broad program of compulsory school reassignments, for the purpose of again rearranging racial proportions in the schools, was put into effect — and the plaintiffs' plea for an injunction was rejected.

More recently, the School Board has made public announcement that again there are several schools in the Charlotte-Mecklenburg system which are exceeding the prescribed racial ratio; that seventeen other schools are presently in the range of 46 to 50 per cent

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[1]Plaintiffs' Exhibit 3, 509, 510, 512, 513, 514.

[2]For some of whom this was the third time they had been forced to change schools on account of their race. Joint Appendix, 10, 14.

black; and that additional large-scale reassignments of pupils, for purposes of still further racial realignments, are in prospect.

REASONS FOR THE GRANTING OF A WRIT OF CERTIORARI

I.

The Central Rulings Of *Brown*, Of *Swann* And Of *Pasadena* With Respect To Constitutional Limitation Upon Public School Assignments Based on Race

The same public school system which, ten years ago, was the subject of this Court's leading decision in *Swann vs. Charlotte-Mecklenburg Board of Education*[1], is now before this Court again, upon the present Petition for Writ of Certiorari. In brief, the situation is that the directive of "remedial" racial school assignments, which was sustained by this Court in *Swann*, has been obeyed and should now be lifted—as this Court foresaw and projected in *Swann* and explicitly thereafter ruled in the case of *Pasadena City Board of Education vs. Spangler*[2].

The question is no longer whether racial assignments may be required for an "interim" in the Charlotte-Mecklenburg school system, but whether racial assignments and reassignments are to be imposed upon the pupils in these schools on a continuing basis, repeatedly and without end.

It is always to be borne in mind that the basic principle established in *Brown vs. Board of Education*[3]

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[1]402 U.S. 1, 91 S. Ct. 1267, 28 L. Ed 2d 544 (1971).

[2]427 U.S. 424, 96 S. Ct. 2697, 49 L. Ed 2d 599 (1976).

[3]347 U.S. 483, 74 S. Ct. 686, 98 L. Ed 873 (1954) and 349 U.S. 294, 75 S. Ct. 753, 99 L. Ed 1083 (1955).

was that from that time forward admission to public schools must be "on a non-racial basis"[1]. Likewise, it is to be remembered that in *Swann,* this Court emphasized that it was countenancing exception to that fundamental mandate and upholding the District Court's Orders for racial assignments in the Charlotte-Mecklenburg schools only "as an interim corrective measure"[2].

In 1976, this Court firmly applied this "interim" limitation, and specifically struck down continuing racial assignments in a situation paralleling all of the pertinent circumstances of the present case. In that case, *Pasadena City Board of Education vs. Spangler*[3], as in the present case, the school authorities had put into effect "a plan for desegregating" the public schools as required by the District Court[4]. There, as here, the plan provided for pupil attendance assignments that would eliminate all instances of "minority students" constituting "a majority" of the student body in any school[5]. In *Pasadena,* as in the present case, "the initial implementation" of the plan by the District Court, did accomplish the racial proportions which the Court had ordered[6].

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[1]*Brown,* 349 U.S. 294, 301, 99 L. Ed. 1083, 1106.

[2]*Swann,* 402 U.S. 1, 27, 28 L. Ed 2d 554, 573.

[3]*Pasadena City Board of Education vs. Spangler,* 427 U.S. 424, 96 S. Ct. 2697, 49 L. Ed 2d 599 (1976).

[4]*Pasadena,* 427 U.S. 424, 428, 49 L. Ed 2d 599, 604.

[5]Idem.

[6]*Pasadena,* 427 U.S. 424, 436-437, 49 L. Ed 2d 599, 608-609.

Thereafter, however, at each of several schools, in *Pasadena* as in the present case, there gradually developed a "black student enrollment" exceeding "50% of the school's total enrollment"[1]. In *Pasadena,* the number of schools thus varying from the prescribed racial ratio some three years after the achievement thereof, was five out of the thirty-two schools in the system[2]. In Charlotte-Mecklenburg, the number of schools varying from the same prescribed racial ratio, approximately four years after the achievement thereof, was, as hereinabove noted, eight out of the one hundred and five schools in the system[3].

In its *Pasadena* decision, after quoting from its language in *Swann* to the effect that "it does not follow that the communities served by [unitary] systems will remain demographically stable, for in a growing, mobile society, few will do so", this Court then went on to say:

> "It may well be that petitioners have not yet totally achieved the unitary system contemplated by this quotation from Swann ... But that does not undercut the force of the principle underlying the quoted language from Swann. In this case the District Court approved a plan designed to obtain racial neutrality in the attendance of students at Pasadena's

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[1]*Pasadena,* 427 U.S. 424, 431, 433-434, 49 L. Ed 2d 599, 605, 606, 607.

[2]*Pasadena,* 427 U.S. 424, 431, 433-434, 49 L. Ed 2d 599, 605, 606-607.

[3]Plaintiffs' Exhibit 3, 492-508.

public schools. No one disputes that *the initial implementation* of this plan accomplished *that*[1] objective. That being the case, the District Court *was not entitled to require the PUSD to rearrange its attendance zones each year so as to ensure that the racial mix desired by the court was maintained in perpetuity.* For having once implemented a racially neutral attendance pattern in order to remedy the perceived constitutional violations on the part of the defendants, the District Court *had fully performed its function of providing the appropriate remedy for previous racially discriminatory attendance patterns*" (emphasis supplied).

Pasadena, 427 U.S. 424, 436-437, 49 L. Ed 2d 599, 608-609

It is respectfully submitted that the application of this ruling, foreseen in *Swann*, and explicitly thus enunciated in *Pasadena*, cannot rightly now be denied to the plaintiffs in the present case.

II.

Remedial Racial Assignments Were Put Into Effect In The Charlotte-Mecklenburg Schools, Specifically As Ordered By The District Court, And Did Accomplish Corrective Racial Ratios In Each And All Of The Schools, Specifically As Ordered By The Court

As has been hereinabove indicated, the 1974 Charlotte-Mecklenburg racial assignment plan and program, as ordered by the District Court, left nothing to generalities. It was controlled by the Court's specific

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[1]Emphasis in original.

directive that blacks should be assigned to each school, but should not constitute more than 50 per cent of the student body in any school. To achieve those specified objectives, however, each step to be taken was also specified — how many blacks and how many whites were to go from what schools and to what schools — and what would be the resulting numbers and percentages of blacks and of whites in each school.

Thus it cannot be denied, and it is not denied, that in this case *the racial assignments and reassignments designated and specified by the District Court were put into effect in the Charlotte-Mecklenburg schools,* and that *the racial ratios prescribed by that Court were thereby brought about in each and all of these schools.*

At the hearing in this case, the Superintendent of the school system testified, on cross examination, that after the making of "pupil assignments" under the "Court requirements of 1974", the Charlotte-Mecklenburg schools "were in compliance with the [racial] ratios required by the Court Order" and that "after the Court requirements were imposed", the "black percentages were less than 50 per cent in all schools except the Hidden Valley school"[1]. Similarly, the Chairman of the defendant School Board, on cross examination, testified that "after the 1974 Court Order" was complied with, "there were no schools in the system higher than 50 per cent black except Hidden Valley"[2].

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[1]Joint Appendix, 352-353, 354.

[2]Joint Appendix, 391.

It will also be remembered that the School Board in 1975 so reported to the Court, and that all parties in *Swann* agreed to a dismissal of the case, and the District Court directed that the file "be closed".

Did there subsequently occur any official segregative actions or omissions which brought about variances from the prescribed and achieved racial ratios? The defendant School Board categorically states in its answer in the present case that "since the adoption of its 1974 pupil assignment plan, it has not committed any segregative acts or omissions whatever"[1]. The Chairman of the School Board, himself a black, testified on cross examination as follows:

> "Q. Under the heading of what are called demographic changes, that is people moving from where they were, families moving, children therefore leaving the schools that they had been attending, other people moving in, shifts in the population, black and white of this nature, was [this] the main thing that caused changes or variations in the black ratio percentages in the schools?
>
> "A. Yes, sir"[2].

Similarly, the Superintendent of the schools, on cross examination, testified:

> "Q. There had been, as you have already testified, I believe, a lot of moving in and moving out of the

[1]Joint Appendix, 13.

[2]Joint Appendix, 392.

attendance areas and out of the various zones that fed pupils into the various schools, and those are called demographic changes, I believe?"

"A. Yes".

. . .

"Q. How is it possible, Doctor, to keep each school in the percentage, anywhere in the percentage of black that you have referred to, if demographic changes, and people moving in and out and around, result in the black ratio rising? How are you going to keep the schools, some schools, from rising . . ."?

"A. Using the same methods we've been using, I assume"[1].

The "same methods" of course means that which is here challenged, namely, the continual moving of pupils, according to their race, around and about among the schools, so as to re-establish and maintain perpetually in each and all schools a prescribed racial ratio. Against that, however, this Court has taken its stand, in *Brown,* in *Swann* and in *Pasadena.*

However, the District Court, in its decision, turns away from the obvious and unavoidable realities of demographic change. The Court suggests, for example, that if school buildings were differently located, in relation to the residences of pupils, that might prevent the development of changes in the racial ratios in the schools. In fact, however, that there is no method of

[1]Joint Appendix, 355, 380.

selecting school building locations that will assure against changes in racial ratios among the pupils. For example, statistical exhibits in evidence in this case show that of eighteen Charlotte-Mecklenburg schools built in predominantly black residential areas, only two have ever exceeded the 50 per cent ratio limitation on black enrollment — whereas seven schools built in predominantly white residential areas have exceeded the 50 per cent ratio limitation on black enrollment.

The District Court further declares that the Board's allowing of too many individual transfers of pupils, from one school to another, is a major factor in causing variances from prescribed racial ratios. The Court accepts, however, the testimony of the Chairman of the School Board that the great bulk of such transfers are the result of "residential changes". Yet the Court insists that if a transfer of a pupil would tend to affect "adversely" the racial ratio in a school, then the pupil shall not be allowed to transfer to another school — no matter that the pupil's residence has changed so that his transfer to the other school is completely justified. Such position is, however, permeated with the same fallacy as the concept that a dictated racial ratio, achieved by compulsory assignments according to race, must be forever maintained by additional and continuing racial assignments.

> "Classifications based on race for purposes of transfer between public schools, as here, violate the Equal Protection Clause of the Fourteenth Amendment".
>
> *Goss vs. Board of Education*,
> 373 U.S. 683, 687, 83 S. Ct.
> 1405, 10 L. Ed 2d 632, 635 (1963)

A still further proposition, put forward by the District Court's decision, is that to "some" extent, unstated and unknown, the racial reassignments here in question had purposes that were not racial, such as the accomplishing of improved utilization of an over-utilized or an under-utilized school. Yet, among the thousands of pupils who were reassigned, neither the Court nor the defendants pointed to any instance in which a pupil would have been reassigned had he been of a different race.

III.

The District Court Insistently Requires Ongoing Racial Ratios In The Charlotte-Mecklenburg Schools And "Continuing Control Over The Race Of Children In Each School"

The District Court does not by any means accept the limited "interim corrective" concept of racial school assignments. Both before and since this Court's decision in *Swann*, the District Court has repeatedly ordered in the Charlotte-Mecklenburg school system:

> "That the defendants *maintain a continuing control over the race of children in each school*, such as was done for many decades before *Brown vs. Board of Education*, and maintain the make-up of each school (including any new and any re-opened schools) to prevent any school from becoming racially identifiable" (emphasis added).
>
> . . .
>
> "That no school be operated with predominantly black student body".
>
> . . .

"The defendants are enjoined and restrained from operating any school for any portion of a school year with a predominantly black student body"[1].

This is not only a requirement, but is also an ongoing and permanent requirement, of a "particular degree of racial balance or mixing" which this Court in *Swann* "disapproved" and forewarned that it "would be obliged to reverse"[2]. It is precisely the sort of "in perpetuity" requirement which this Court thereafter, in *Pasadena*, did reverse.

IV.

The Court Of Appeals Has Ruled That, Whether Or Not The District Court Has Exceeded Its Power, The School Board Itself Has Power To Prescribe And Require Racial Ratios In Each And All Of The Charlotte-Mecklenburg Schools

Although the matters hereinabove outlined are the heart of this controversy, the Court of Appeals did not rule upon them. Instead, the plaintiffs' plea for constitutional protection against being reassigned from school to school because of their race, was rejected by the Court of Appeals entirely upon an "alternative" ground, namely, that the decision to impose the challenged racial reassignments "was reached independently and without regard to Court intervention and constituted a valid exercise of the Board's power over

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[1]District Court's Orders of February 5, 1970, June 29, 1971, and July 30, 1974, in *Swann*.

[2]*Swann*, 402 U.S. 1, 24, 28 L. Ed 2d 554, 571.

educational policy"[1]. "The School Board", said the Court of Appeals, "is vested with broad discretionary powers over educational policy and is well within its powers when it decides that as a matter of policy schools should not have a majority of minority students"[2].

It is to be noted that this pronouncement is not in any way limited to a situation, as in *Swann*, calling for or justifying "remedial" or "corrective" racial assignments. Nor has the Court of Appeals in any sense determined or ruled that such a situation presently exists in the Charlotte-Mecklenburg schools.

The broad proposition enunicated by the Court of Appeals is that since a school board has "discretionary powers over educational policy", therefore it may at any time, in the exercise of its discretion, put into effect programs under which pupils shall be assigned according to race, so as to create specified ratios of race in each and all of the schools under its jurisdiction.

There is, however, a fundamental fallacy in this proposition. It renders a school board — by virtue of its "educational policy" discretion — immune to the central mandate of *Brown*. As has been hereinabove emphasized, that mandate is that assignments to public schools shall be "on a non-racial basis". Yet the Court of Appeals' pronouncement is that a school board, though it is a governmental agency as truly as

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[1]Appendix to this Petition, p. 3a

[2]Idem., p. 5a

a court, may in its discretion do at any time what a court can do only in a *Swann* "remedial" situation, namely, assign pupils to public schools on a racial basis.

Indeed, the defendant School Board, like most school boards, is an agency of state government, and as such is directly and specifically subject to the interdiction of the United States Constitution's Fourteenth Amendment, the fundamental authority on which *Brown* rests.

There is further irony in the Court of Appeals' holding that the defendant School Board can in its "educational policy" discretion make racial school assignments — even though the Court of Appeals, as it clearly states, has made no determination that there is here a "remedial" situation requiring or supporting such racial assignments. If the School Board — even in the absence of a *Swann* remedial situation — is immune to the *Brown* mandate that school assignments shall be made "on a non-racial basis", then the Board, or a successor Board, could some day arrive at a genuinely considered decision that "educational policy" would be wisely and beneficially served by making racial assignments upon ratios such as would tend greatly to diminish or eliminate racial integration in the school system.

Logically, such could certainly be a consequence of this concept that even though *Brown* prohibits racial ratio school assignments, a school board may never-

theless make racial ratio assignments as and when it sees fit, if in doing so it is acting upon "educational policy". The Petitioners respectfully submit, to the contrary, that under the non-racial mandate of *Brown*—except when a *Swann* "remedial" situation exists—no governmental authority, including a school board, has discretion, whether in the advancement of "educational policy" or otherwise, to make public school assignments on the basis of selections according to race.

There is yet another paradox in the declaration that whether a *Swann* "remedial" situation exists or not, the defendant School Board nevertheless has "educational policy" discretion to make school assignments on a racial basis. The Charlotte-Mecklenburg School Board, as pointed out above, is an agency of the State of North Carolina. North Carolina has a statute which provides that:

> "No person shall be refused admission into or be excluded from any public school in this State on account of race, creed, color or national origin".
>
> "... No student shall be assigned or compelled to attend any school on account of race, creed, color or national origin ... "
>
> General Statutes of North Carolina
> Section 115-176.1

These North Carolina statutory provisions are obviously in harmony with the "non-racial" mandate of

Brown. However, just as "interim" exception is made to the *Brown* non-racial mandate in a *Swann* "remedial" situation, likewise a *Swann* "remedial" situation prevails over the "non-racial" mandate of North Carolina Statute.

Since, however, a *Swann* "remedial" situation requiring corrective racial assignments does not now exist in the Charlotte-Mecklenburg schools—as the record in this case specifically and conclusively shows and as the Court of Appeals does not question—therefore the "non-racial" mandate of this North Carolina Statute, paralleling the "non-racial" mandate of *Brown,* is in full force and effect and prohibits racial assignments. In other words, it is an obvious self-contradiction to say that the Charlotte-Mecklenburg School Board, a creature of North Carolina Statute, can exercise an "educational policy" or "discretion" directly contrary to the mandate of North Carolina Statute—in circumstances where there is no *Swann* "remedial" situation, and where the North Carolina Statute and its model, the *Brown* mandate, are consequently in full force and effect[1].

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[1]It will surely be agreed that the comment in *Swann*—to the effect that "school authorities are traditionally charged with broad power to formulate and implement educational policy", 402 U.S. 1, 16, 28 L. Ed 2d 554, 566, which might enable such school authorities to prescribe racial ratio in their schools as they see fit—could hardly be applicable where the school authorities are directly "charged" to the contrary by a State Statute which is now and in the present situation lawfully in force and effect.

V.

Summary

In dealing with a case such as this, it is absolutely necessary to recognize the compulsions which are in fact imposed in racial school assignments. For example, in *Swann,* when the same schools were before the Court as in the present case, this Court emphasized that:

> "Our objective in dealing with the issues presented in these cases is to see that school authorities exclude no pupils of a racial minority from any school, directly or indirectly, on account of race . . . "[1]

Yet that very objective was repudiated and violated on a wholesale basis in the racial reassignments which are the subject of the present suit. As has been hereinabove noted, 4,825 pupils were involved in the reassignments now at issue, altering the racial proportions in seventy-six of the Charlotte-Mecklenburg schools. Of these 4,825 pupils, 2,775 were black and 2,050 were white[2].

It is essential to understand that racial assignments, to achieve or re-achieve specified racial ratios among school pupils, involve compulsions upon both black and white pupils. Such assignments inevitably involve the excluding of various numbers of children, black

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[1]*Swann,* 402 U.S. 1, 23, 28 L. Ed 2d 554, 570.

[2]Plaintiffs' Exhibit 3, 490.

and white, from some schools, "on account of race"—and the sending of various numbers of them, black and white, to other schools, "on account of race".

Under the reassignment program here at issue, the necessary meaning of the compulsion imposed upon each of thousands of pupils, black and white, is this:

> "Although you are otherwise qualified to attend this school where you have been attending or wish to attend, and although you would be allowed to attend here now were it not for your race, in order to alter the racial ratio in this school there should be less pupils of your race here—and in order to alter the racial ratio in another school there should be more pupils of your race there. Consequently, because of your race, you are excluded and barred from this school, and because of your race you are assigned to another school, and there you must go".

The whole situation and sequence thus stands in clear and stark relief. To bar a pupil from a school because of his race—or to compel him to go to another school because of his race—cannot be squared with the landmark decision in *Brown*, namely, that assignments to public schools must be "on a non-racial basis". Under *Brown* this right not to be barred from a school because of race nor sent to another school because of race is a constitutional right, derived from the Fourteenth Amendment to the United States Constitution and belongs to the individual pupil.

> "The rights created by the First Section of the Fourteenth Amendment are, by its terms, guaranteed to the individual. The rights established are personal rights".
>
> *Shelly vs. Kraemer*, 334 U.S. 1, 22, 68 S. Ct. 836, 92 L. Ed 1161, 1185 (1948)

Swann did establish that this constitutional right could be suspended, but only for an "interim", while racially integrative assignments are being made "in correction" of earlier racially segregative assignments.

Pasadena enforced this "interim" limitation, specifically holding that once corrective racial assignments had been put into effect as ordered, then further and continuing racial assignments are constitutionally invalid.

In the present case, involving the same schools which were before the Court in *Swann*, it cannot be denied that racial "interim" assignments have been put into effect specifically as prescribed by District Court Orders.

Nevertheless, racial reassignments are again being imposed upon Charlotte-Mecklenburg public school pupils, including the plaintiff pupils — the District Court adhering to the erroneous concept, and the defendant School Board apparently acquiescing there-

in, that the school authorities must "maintain a continuing control over the race of children in each school ... and maintain the racial make-up of each school" and are "enjoined and restrained from operating any school for any portion of a school year with a predominantly black student body" — indefinitely and without end.

In such state of affairs, the plaintiffs are, by the supreme law of this land, entitled to protection against being thus compulsorily barred from schools, *because of their race*, or compulsorily assigned to other schools, *because of their race.*

It is firmly established as a fundamental precept of our constitutional law that government and governmental agencies, whether state or federal, shall place no restriction and no requirement upon any person because of his or her race. The plea now to this Court is that the promised and assured protection of that basic principle be no longer denied to these Petitioners.

Respectfully submitted,

WHITEFORD S. BLAKENEY
Attorney for the Petitioners

APPENDIX

IN THE

United States Court of Appeals

FOR THE FOURTH CIRCUIT

NO. 79-1586

George Martin, for himself and in behalf of his minor children, Ellen and Catherine Martin, et al.,

Appellants,

VERSUS

Charlotte-Mecklenburg Board of Education, et al.,

Appellee.

Appeal from the United States District Court for the Western District of North Carolina, at Charlotte. James B. McMillan, District Judge.

Argued May 5, 1980. Decided July 23, 1980

Before HAYNSWORTH, Chief Judge, BUTZNER and PHILLIPS, Circuit Judges.

Whiteford S. Blakeney (Blakeney, Alexander & Machen on brief) for Appellant; William W. Sturges (Hugh B. Campbell, Jr., Weinstein, Sturges, Odom, Bigger, Jonas & Campbell, P.A. on brief) and Julius L. Chambers (Karl Adkins, Chambers, Stein, Ferguson & Becton, P.A. on brief) for Appellee.

PHILLIPS, Circuit Judge:

Plaintiffs brought this suit for themselves and their children, students in the Charlotte-Mecklenburg school system, seeking to enjoin the Board of Education from implementing the Board's 1978 pupil reassignment plan. The district court denied plaintiffs' prayer for a temporary restraining order and an injunction, and this appeal followed. Concluding that the 1978 assignment plan is within the Board's plenary powers over educational policy, we affirm.

I

In *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971), the Supreme Court upheld a series of orders by the district court designed to implement desegregation of the Charlotte-Mecklenburg school system. In 1974 the School Board and a citizens group submitted a proposal for student reassignment to the district court. The proposed assignments were intended to result in no school with a majority of minority students (with one exception), and the proposal called for review and adjustment of pupil assignments every third year. The district court adopted the joint proposal and in 1975 removed the case from the active docket noting that existing orders continued in full force and effect. In 1978 the Board reviewed pupil assignments and reassigned 2,050 white and 2,775 black students out of approximately 78,000 students in the system. Plaintiffs sought to enjoin implementation of the 1978 plan on the theory that reassignments made to achieve a particular racial ratio violated their right to equal protection under the four-

teenth amendment. Plaintiffs argued below that *Brown v. Board of Education*, 347 U.S. 483 (1954) (*Brown I*); 349 U.S. 294 (1955), mandates that assignments to schools be made on a nonracial basis and that under *Pasadena City Board of Education v. Spangler*, 427 U.S. 424 (1976), the 1978 plan was invalid because a racially neutral attendance pattern was achieved in 1974. The district court held that a racially neutral attendance pattern had never been achieved and that certain of defendant's policies, including construction and school closing decisions, and a transfer procedure that was inadequately monitored, contributed to segregation. In the alternative the district court held that the Board's decision to adopt the 1978 plan was reached independently and without regard to court intervention and constituted a valid exercise of the Board's power over educational policy.

II

When an unconstitutionally segregated school system prohibited under *Brown I* exists, the school authorities are under an affirmative obligation to dismantle the dual system. If the school authorities default in their obligation, the "district court has broad power to fashion a remedy that will assure a unitary school system." *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. at 16. When the system achieves compliance with *Brown I*, further judicial supervision over the school system is unnecessary unless school authorities deliberately attempt to segregate the schools by altering attendance patterns. *Id.* at 31-32. The school system in *Pasadena* was found to be

unconstitutionally segregated in 1970, and the district court enjoined the school board to assign students in such a manner that no school would have a majority of minority students. The board complied with the order and reassigned students to achieve racial balance. In 1974 the school board sought relief from the requirement that no school have a majority of minority students, but the district court refused to modify its injunction. The Supreme Court reversed and held that *Swann* limited judicial remedial power to cases in which the school authorities have caused segregation. 427 U.S. at 434. In *Pasadena* there was no showing that the post-1970 changes in the racial composition of the schools were caused by the Board's actions. After racial neutrality in attendance patterns was achieved in 1970, the district court could not require yearly adjustment of student assignments to ensure racial balance. *Id.* at 435-37. The school board was, therefore, entitled to relief from the injunction to the extent that the order required alteration of attendance zones. *Id.* at 440.

Plaintiffs urge on this appeal that *Pasadena* prohibits the reassignment made in 1978. We conclude, however, that *Pasadena* is inapposite. The maintenance of the 50% limitation on minority assignments was admittedly a large factor in the Board's decision to reassign students in 1978. The 50% requirement is embodied in the joint proposal adopted by the district court in 1974, but the Board independently decided in 1978 to adhere to its commitment under the 1974 proposal. The district court did not intervene to coerce

the reassignments, and the Board did not seek to be relieved of any outstanding order of the district court.

For these reasons *Pasadena* is inapplicable, and the validity of the Board's decision to reassign students in order to maintain racial ratios must be evaluated under principles enunciated in *Swann*. The School Board is vested with broad discretionary powers over educational policy and is well within its powers when it decides that as a matter of policy schools should not have a majority of minority students. *See Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. at 16. The assignments made in 1978 were well within the plenary powers of the Board.

Because we conclude that the 1978 assignment plan was a valid exercise of the Board's powers, we do not address the alternate holding relied on by the district court. The judgment of the district court is affirmed.

AFFIRMED.